

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1022

United States Court of Appeals FOR THE SECOND CIRCUIT

AMERICAN FOREIGN STEAMSHIP CORPORATION,
Plaintiff-Appellant,
against
UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL BY AMERICAN FOREIGN STEAMSHIP CORPORATION,
FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX BY ATTORNEYS FOR THE RESPECTIVE PARTIES

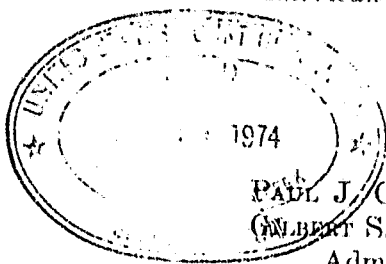
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Docket Entries.

72 Civ. 3459 American Foreign Steamship Corp v. USA

DATE	PROCEEDINGS
Aug. 14-72	Filed Complaint & issued Summons
Sep. 18-72	Filed Summons with Marshal's return— Served U.S. Atty. on 8-22-72
Oct. 31-72	Filed defts Interrogatories to the Pltff.
Oct. 31-72	Filed defts ANSWER to the complaint. WNS, Jr.
Oct. 31-72	Filed defts request for production of documents.
Feb. 8-73	Filed defts notice to take deposition of Mr. Prentice Layton on 2/21/73
Jun. 19-73	Filed deft's Request for Admissions.
Jul. 2-73	Filed pltff's Request for Admissions.
Jul. 25-73	Filed Governments proposed Findings of Fact.
Jul. 25-73	Filed Governments answers to request for admissions.
Jul. 25-73	Filed Governments trial memorandum
7-19-73	Filed pltff's response to notice to Admit
Sep. 21-73	Filed Deft's Reply to Pltff's proposed Findings of fact and conclusions of law
Sep. 21-73	Filed Supplementary trial brief on Behalf of United States.
Oct. 29-73	Filed OPINION #39959 and Findings of fact and conclusions of law. Defendant U.S.A., has sustained the burden of proving that in the circumstances the striking was an inevitable accident caused by Act of God and that it was free from any fault contributing to striking or collision and con-

Docket Entries.

DATE	PROCEEDINGS
	sequent damage to SS American Falcon. The U.S.A. is entitled to judgment with costs.—Gurfein, J. (m/n)
Oct. 29-73	Filed plaintiff's trial memorandum
Oct. 29-73	Filed plaintiff's comments on deft's proposed findings and conclusions.
Nov. 28-73	Filed Pltff. Notice of Appeal for 2nd Circuit from the decision of U.S.D.C.
Dec. 14-73	Filed Consent Judgment #73,980 etc. Judgment Ent.—Clerk
Dec. 18-73	Filed Judgment & Order That Deft. U.S.A. Have Judgment Against The Plaintiff.
12/28/73	Filed Stip. Designating True Copy of Documents Missing From File.
1/ 4/74	Filed Stip. Designating Exhibits To Be Transmitted To U.S.C.A.

A True Copy

RAYMOND F. BURGHARDT, Clerk

By WARNER J. FREEMAN
Deputy Clerk

Log Extract of Tug "LT-531".

DISPOSITION FORM

For use of this form, see AR 340-15; the proponent agency is The Adjutant General's Office.

Reference or Office Symbol	Subject
RIBCTO-OH	Damage Possibly Caused to S/S "American Falcon"

To	From	Date	CMT 1
George T. Langley	Master	29 September 1970	
Major TC	USAV LT-535		
Chief, H/M Branch			

1. Extract from Tugs Rough Log, Saturday, 5 September 1970.

1100 hrs. Okinawa is now in Typhoon Condition Four (4).

1300 hrs. Weather Barometer 29.38 Wind SSW 5-6 Overcast, Light rain.

1322 hrs. SWE. Power on bridge.

1325 hrs. Cast off Lines.

1330 hrs. Departed W/Beach for Tengan (To sail S/S American Falcon) set course 165 degrees Gyro.

1355 hrs. At buoy #2 various courses to Tengan.

1430 hrs. Slow down Engines, 140 RPM, due to Heavy NE Ground Swells. Vessel Rolling Heavily, course 010 degrees Gyro.

1450 hrs. Resumed full speed 160 RPM.

1520 hrs. Abeam Chimu wan Sea buoy. Altered course 270 degrees Gyro.

Log Extract of Tug "LT-531".

- 1530 hrs. Okinawa is now in Typhoon Condition Two (2). Received from ADD 3; Wind Warning. Valid 05/1000/I to 05/1600/I. 030 degrees—20 knots w/ Gusts to 40 knots, Becoming 340 degrees 20 to 40 knots after 1300 hours today.
- 1625 hrs. Arrived Tengan.
- 1630 hrs. Made up starboard bow S/S "American Falcon" w/2 head lines. (As per Papa 3, Capt P. LAYTON) undocking.
- 1655 hrs. Vessel (S/S "American Falcon") undocked off Tengan pier, North side. (While Tug was pushing full speed ahead, rolling of S/S "American Falcon" due to Heavy Swells was causing Tug's Bow fender to rub up and down and at the same time bounce away and back against the hull, of S/S "American Falcon". This condition was passed on to Pilot as also the fact that Damage may have been caused. Two (2) 8" Bow lines parted while pushing S/S "American Falcon" around.
- 1720 hrs. Papa 3, Capt P. LAYTON aboard Tug. (LT 531)
- 1727 hrs. Papa 3 aboard LT-25 from LT-531) to take him to Tengan pier.
- 1730 hrs. Departed Tengan for White Beach.
2. At the time of the alleged damage to S/S "American Falcon" I was assigned as Master aboard the USAV LT-531.

Fred E. Ackermann
FRED E. ACKERMANN
Master, USAV LT-535

Opinion by Murray I. Gurfein, J.

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GURFEIN, D.J.:

The action was tried on a submission of depositions and documents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff, American Foreign Steamship Corporation, was at all times hereinafter mentioned a corporation, organized and existing under and by virtue of the laws of the State of New York with an office and place of business in the Borough of Manhattan, City and State of New York, and was and now is the owner and operator of the SS AMERICAN FALCON. (Admitted, Exhibit 4, No. 1).
2. The SS AMERICAN FALCON, Official Number 252, 524 is an American flag vessel of 7,933 Gross Tons.
3. The SS AMERICAN FALCON was, prior to the collision of September 5, 1970, tight, staunch and strong, and in all

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respects seaworthy and properly manned, officered, equipped and supplied. (Layton Dep. p. 18, lines 5, 6; Chaffin Dep. p. 64).

4. Defendant, United States of America, was and now is a corporation sovereign which has by law consented to be sued under the provisions of the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. § 741, et seq. (Admitted in Defendant's Answer to Complaint).

5. On or about September 5, 1970, the SS AMERICAN FALCON was under a contract of charter party with defendant, United States of America, to transport various cargo to, among other ports, the port of Tengan, Okinawa. (Admitted, Exhibit 4, No. 2).

6. On September 5, 1970, the SS AMERICAN FALCON was docked; port side to, at Tengan Pier, Okinawa. (Admitted, Exhibit 4, No. 3).

7. At all times material hereto, the Port of Tengan, Okinawa was operated and controlled by employees and/or agents of the defendant, United States of America. (Admitted, Exhibit 4, No. 4; Layton Dep. p. 21).

8. Pilotage was compulsory for the navigation of vessels such as the SS AMERICAN FALCON in and out of the Port of Tengan. (Admitted, Exhibit 4, No. 5).

9. The only pilots available and/or authorized to dock and undock vessels at Port of Tengan, Okinawa, were employees and/or agents of defendant, United States of America. (Admitted, Exhibit 4, No. 6).

10. Prentice A. Layton, an employee of defendant, was a government pilot assigned to direct the undocking of

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the SS AMERICAN FALCON at Tengan, Okinawa, on September 5, 1970. (Admitted, Exhibit 4, No. 12).

11. The only tugboats available for docking and undocking operations at Port of Tengan, Okinawa, were owned, operated and controlled by defendant, United States of America. (Admitted, Exhibit 4, No. 7).

12. The Captain and crew of each of the aforementioned tugboats were employees and/or agents of defendant, United States of America. (Admitted, Exhibit 4, No. 8).

13. The movement of all vessels such as SS AMERICAN FALCON in, out or about the ports in Okinawa, including Port of Tengan is controlled by the Harbor Master and/or other members of the Department of the Army, all of whom are employees and/or agents of the defendant, United States of America. (Admitted, Exhibit 4, No. 9).

14. Weather information, reports and/or warnings are furnished to personnel and merchant vessels, such as SS AMERICAN FALCON on the island of Okinawa, by Kaden Air Base weather station which is operated and controlled by employees and/or agents of defendant, United States of America. (Layton Dep. p. 25, lines 11-23).

15. The Harbor Master and/or other employees of the defendant, United States of America, has the responsibility of advising all personnel, including merchant vessels, such as SS AMERICAN FALCON, in Okinawa of weather conditions in and about the vicinity of the island of Okinawa. (Layton Dep. p. 25, lines 24-25; p. 26, lines 1-5).

16. The defendant, United States of America, was required under a contract entered into by the parties hereto, to furnish the SS AMERICAN FALCON with tugboats for un-

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docking at Port of Tengan, Okinawa on September 5, 1970. (Admitted, Exhibit 4, No. 11).

17. At 0400 on September 5, 1970 at Tengan, the wind was from the northeast at about Force 3-4 (Gentle Breeze 8-18 M.P.H.), (Logbook, Exhibit 1, Beaufort Scale, Exhibit 5).

18. At or about 0900 on September 5, 1970, Captain Chaffin, Master of SS AMERICAN FALCON called the Harbor Master of Tengan and requested extra wire and/or mooring lines to protect the vessel from increasing winds (Chaffin Dep. p. 62, lines 1-7; p. 175, lines 11-25).

19. At or about 0930 on September 5, 1970, Pilot Layton, an employee of defendant, was aware of the storm to southeast moving into the area of Port of Tengan, Okinawa. (Layton Dep. p. 28, lines 16-20; p. 29, lines 16-23).

20. The weather conditions were building up, i.e., worsening on the morning of September 5, 1970 at Tengan (Layton Dep. p. 27, lines 1-9; Chaffin Dep. p. 76, lines 6-10).

21. At or about 0900 on September 5, 1970, Captain Chaffin requested, due to increasing winds and approaching typhoons that SS AMERICAN FALCON be allowed to sail from Port of Tengan as soon as practicable or about 1200. (Chaffin Dep. p. 69, lines 1-12; p. 75, lines 8-22).

22. At or about 0900 on September 5, 1970, Captain Chaffin was advised by Harbor Master that he would not furnish tugs until 1600. (Chaffin Dep. p. 75, lines 8-22).

23. At or about 0930 on September 5, 1970, Pilot Layton boarded the SS AMERICAN FALCON and advised Captain Chaffin that the vessel should be moved to the open sea

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as soon as practicable in view of the approaching typhoon. (Layton Dep. p. 31, lines 3-9; Chaffin Dep. p. 62, lines 8-11, p. 69, lines 1-7).

24. When a typhoon is approaching an area the correct procedure for a vessel moored to an exposed pier such as Tengan, is to clear the pier and head for open sea. (Layton Dep. p. 30, lines 17-25; p. 31, lines 3-20).

25. Shortly after the conversation referred to in No. 23, both Pilot Layton and Captain Chaffin requested the Harbor Master that in view of the emergency of weather conditions, the SS AMERICAN FALCON should be moved from the pier to the open sea as soon as possible. (Layton Dep. p. 32, lines 4-12; p. 33, lines 11-18; Chaffin Dep. p. 62, lines 8-14).

26. After the aforesaid conversation with Harbor Master, Pilot Layton remained at Tengan pier for a considerable length of time until 11:30 A.M. (Layton Dep. p. 34, lines 7-13).

27. At 1200 on September 5, 1970 at Tengan, the wind was from the West at about Force 3 (Gentle Breeze, 8-12 M.P.H.) (Logbook, Exhibit 1, Chaffin Dep. p. 71, lines 11-13, Beaufort Scale, Exhibit 5).

28. On the morning of September 5, 1970, the SS AMERICAN FALCON could have been secured for sea in one hour. (Chaffin Dep. p. 64).

29. The SS AMERICAN FALCON could have been sufficiently manned, battened down and secured to proceed to sea, even in typhoon conditions, at 1200 on September 5, 1970. (Chaffin Dep. pp. 63, 64, 66, lines 1-4, pp. 71, 73, 74).

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30. At 1200 on September 5, 1970, the wind was relatively slight and continued so for a period of more than two hours. (Logbook Exhibit 1, Chaffin Dep. p. 71, lines 11-25).

31. The Harbor Master at Tengan knew that the eye of typhoon was over Okinawa at or about 1200 on September 5, 1970. (Chaffin Dep. p. 67, lines 4-16).

32. The wind and sea continued to increase in intensity from 1200 to 2000 when it reached Force 7 (Near Gale, 32-38 M.P.H.) on September 5, 1970 at Tengan. (Logbook Exhibit 1; Chaffin Dep. p. 74, lines 10-17, Beaufort Scale, Exhibit 5).

33. The Harbor Master of Tengan furnished two tugs and ordered the departure of the SS AMERICAN FALCON at 1600 on September 5, 1970. (Layton Dep. p. 38, lines 12-17; Chaffin Dep. p. 69, lines 8-16).

34. Tug "LT 531" was furnished by defendant, United States of America, to assist Pilot Layton in the undocking of the SS AMERICAN FALCON at Tengan, Okinawa, on September 5, 1970. (Admitted, Exhibit 4, No. 17).

35. Tug "LT 531" had previously assisted another vessel in Buckner Bay, which is another port on island of Okinawa at 0800 on day of the striking. (Layton Notebook Exhibit 3, Layton Dep. p. 28, lines 5-6).

36. The only vessel in Buckner Bay was the U.S.N.S. BOYCE which sailed the day after the striking. (Layton Notebook Exhibit 3, Layton's Dep. p. 39, line 25; p. 40, lines 3-7).

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37. There is insufficient evidence to establish that Tug "LT 531" was available to leave Buckner Bay to assist in the undocking of the SS AMERICAN FALCON from 0842 on September 5, 1970. (Layton Notebook Exhibit 3).

38. Tug "LT 531" did not arrive at Tengan Pier to assist the SS AMERICAN FALCON until 1633 hours on September 5, 1970. (Logbook, Exhibit 1).

39. The voyage from Buckner Bay to Tengan is a maximum of two to three hours duration. (Chaffin Dep. p. 72, lines 14-18; Layton Dep. p. 37, lines 22-23).

40. The "LT 531" is a U.S. Army Tugboat approximately three hundred (300) feet in length with a sixteen hundred fifty (1,650) horsepower engine. (Admitted, Exhibit 4, No. 13).

41. Tug "LT 531" was owned, operated and controlled by the defendant, United States of America, and manned by employees of the United States. (Admitted, Exhibit 4, No. 14).

42. Tug "LT 25" was also furnished by defendant, United States of America, to assist Pilot Layton in the undocking of the SS AMERICAN FALCON at Tengan, Okinawa, on September 5, 1970. (Admitted, Exhibit 4, No. 18).

43. The "LT 25" is a U.S. Army Tugboat approximately one hundred (100) feet in length with a one thousand (1,000) horsepower engine. (Admitted, Exhibit 4, No. 15).

44. Tug "LT 25" is owned, operated and controlled by the defendant, United States of America, and manned by

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employees of the United States. (Admitted, Exhibit 4, No. 16).

45. Tugs "LT 531" and "LT 25" made up alongside the SS AMERICAN FALCON at 1633 on September 5, 1970 (Logbook Exhibit 1, Chaffin Dep. p. 66 lines 21-23).

46. Tug "LT 531" was positioned forward, on the starboard side of the SS AMERICAN FALCON during the undocking on September 5, 1970. (Admitted, Exhibit 4, No. 19).

47. Tug "LT 25" was positioned aft, on the starboard side of the SS AMERICAN FALCON during the undocking on September 5, 1970. (Admitted, Exhibit 4, No. 20).

48. Tug "LT 25" was considerably smaller than the "LT 531" and was unable to remain alongside the SS AMERICAN FALCON and assist in the undocking of the vessel. (Layton Dep. p. 12, lines 4-6, 16-21; p. 47, lines 12-15).

49. Tug "LT 531" with its considerable more horsepower was able to hold its own and even helped the smaller tug for a time during the undocking. (Layton Dep. p. 45, lines 23-25; p. 46, lines 3-4).

50. When the tug "LT 25" disengaged and stern of vessel began to swing around, Tug "LT 531" no longer could control the vessel on its own. (Layton Dep. p. 13, lines 11-15; p. 46, lines 5-15).

51. Tug "LT 531" was forced to attempt to undock the SS AMERICAN FALCON *alone*, although at least two large tugs were required to safely undock such a vessel at Tengan on September 5, 1970. (Chaffin Dep. p. 69, lines 23-25, p. 70, lines 2-5; Layton Dep. p. 47, lines 12-15).

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52. The government pilot Layton admitted that two large tugs would have done a much better job of undocking the vessel than utilizing the large "LT 531" and much smaller "LT 25" (Layton Dep. p. 48, lines 3-11; Chaffin Dep. p. 74, lines 18-23), but did not know whether two tugs of the size of "LT 531" would have "held" the vessel (Layton Dep. p. 52, line 17).

53. The pier at which the SS AMERICAN FALCON was secured on September 5, 1970 was an exposed pier surrounded by reefs. (Layton Dep. p. 16, lines 4-11; p. 31, lines 14-20; p. 44, lines 12-14).

(sic) 58. The striking was not caused by any wrongful act of the Government furnished pilot, Captain Layton, or the Government furnished tugs. (Chaffin Dep. pp. 67-68).

(sic) 59. The striking and damage to SS AMERICAN FALCON was not due to any fault, neglect or want of care on part of plaintiff or the SS AMERICAN FALCON or any person for whose acts plaintiff was responsible. (Layton Dep. p. 18, lines 4-6).

(sic) 60. There is insufficient proof that another tug of the size of "LT 531" was actually available to help undock the SS AMERICAN FALCON.

CONCLUSIONS OF LAW

1. This court has jurisdiction of the subject matter of this suit and of the parties hereto.

2. Defendant, United States of America, was and now is a corporation sovereign which has by law consented to be sued under the provisions of the Suits of Admiralty Act, 41 Stat. 525, 46 U.S.C. § 741, et seq.

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3. This suit is within the admiralty and maritime jurisdiction of this court.

4. Defendant, United States of America, was not negligent in the following respects:

a. failing to provide tugs to undock the vessel when the wind was slight and unreasonably delaying departure of SS AMERICAN FALCON until the storm was at its height.

b. failing to provide tugs with the necessary horsepower to undock the vessel under the extraordinary conditions prevailing at Tengan Pier on September 5, 1970.

5. Defendant, United States of America, did not breach its warranty of workmanlike performance in failing to furnish tugboats with the necessary horsepower to undock the SS AMERICAN FALCON under the extraordinary conditions of September 5, 1970.

6. The striking and damage to SS AMERICAN FALCON was not due to any fault, neglect or want of care on the part of plaintiff or the SS AMERICAN FALCON or any person for whose acts plaintiff was responsible.

7. The Government employee pilot, Captain Layton, was not negligent in directing the undocking of the SS AMERICAN FALCON on September 5, 1970 at Tengan Pier, Okinawa.

8. The Government owned and operated tugs, which assisted in the undocking, were not operated in a careless or negligent manner under the circumstances.

9. There was no appreciable difference in sea and wind conditions at 1600 hours and 1633 hours when the undocking actually took place.

Judgment Appealed From.

10. Defendant, United States of America, has sustained the burden of proving that in the circumstances the striking was an inevitable accident caused by Act of God and that it was free from any fault contributing to striking or collision and consequent damage to SS AMERICAN FALCON.

11. The United States of America is entitled to judgment with costs.

Dated: October 29, 1973.

s/

U.S.D.J.

Judgment, Appealed From.

This action was tried on a submission of depositions and documents before the Honorable Murray I. Gurfein, United States District Judge, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter on October 29, 1973, having handed down its opinion, constituting its findings of fact and conclusions of law, directing that the United States of America is entitled to judgment with costs, it is,

ORDERED, ADJUDGED AND DECREED, that defendant, United States of America, have judgment against the plaintiff, American Foreign Steamship Corporation, dismissing the complaint with costs to be taxed.

Dated: New York, N. Y.

December 18, 1973

RAYMOND F. BURGHARDT

Clerk

Notice of Appeal.

Notice is hereby given that the plaintiff, American Foreign Steamship Corporation, above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the decision of the United States District Court for the Southern District of New York, dated October 29, 1973.

Dated: New York, New York, November 28, 1973.

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